No. 56745-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Estate of Leeanna Ruth Mickelson

HEATHER BENEDICT,

Petitioner/Appellant,

v.

JAMES MICKELSON,

Involved Party/Appellee

ON APPEAL FROM THE
THE SUPERIOR COURT
FOR PIERCE COUNTY

The Honorable Jennifer Andrews Judge
Trial Court Cause No. 21-4-02178-5

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal seeks review of actions taken by a superior court judge after the presiding judge determined that the probate of Leeanna Ruth Mickelson had been closed. On January 14, 2022, Pierce County Superior Court Presiding Judge Philip Sorenson entered an order determining the probate proceedings for Leeanna Ruth Mickelson as closed, thereby recognizing Mrs. Mickelson died intestate and the final decree adjudicating the intestacy. This determination came after the presiding judge was able to review a copy of an order signed by a superior court commissioner, unchallenged, which determined that the decedent died intestate. This left any distribution in this short probate under the laws of intestate succession as defined under RCW 11.04.015 and any argument that all community property goes to the surviving spouse as moot, since this is the case with intestate succession anyway, *i.e.,* all community property passes to spouse under intestate succession.

The findings and conclusions on appeal, entered by Judge Jennifer Andrews on February 9, 2022 comes without proper

jurisdiction because of three reasons: 1. it is not from the first filed petition; 2. it ignores the January 14, 2022 order of probate's closure; and 3. it entirely disregards the May 16, 2016 Order of Adjudication of Intestacy and Heirship, the final decree and distribution and the law of the case. All subsequent orders in any other case number other than #16-4-00861-8, including any sanction filings, are *void abinitio* because only the first filing has jurisdiction.

II. ASSIGNMENTS OF ERROR

A. A trial court erred when it entered findings of fact not supported by evidence in the record.

B. A trial court erred in its determination of the law of the case.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

A. Whether the trial court can consider items not in evidence?

B. Whether the trial court can disregard the laws of intestate succession?

IV. STATEMENT OF THE CASE

Leeanna Ruth Mickelson ("Mrs. Mickelson") passed away on May 1, 2012, a Pierce County resident for 38 years.

Her four children (Erik, Scott, Gale, and Heather) and her spouse (James) survived her.

After being unable to secure any copy of any will or will substitute for that matter, on May 16, 2016, the daughter of Mrs. Mickelson, Heather Benedict, Appellant, utilized forms found at the Pierce County Law Library from a probate handbook published by the Washington State Bar Association and authored by attorney Robert Mucklestone, partner with Perkins Coie Law Firm. Ms. Benedict completed the forms and presented them, along with her proposed order, to the ex-parte department, which was signed by a commissioner and acknowledged and filed in open court by clerk Stephanie Meelap. For whatever reasons, the order remains pending to be uploaded by the clerk's office into LINX, Pierce County's public records of court proceedings. Under RCW 11.28.110, once the court enters an order of adjudication of intestacy, no further administration shall be required except as outlined in RCW 11.28.330 or 11.28.340.

Various legal actions were pursued in the multiple cases, which are mentioned in the order on appeal. Nonetheless, at no

time has any document been admitted into evidence purporting anything other than an intestate death. There was a lot of banter about the validity of community property agreements in Washington State[1]. Although asserted by Respondent's counsel, no such community property agreement has ever been produced and admitted into evidence. Pursuant to RCW 11.28.340, the four-month window allowed to contradict such an order of adjudication of intestacy has long expired and there is no disagreement with the order that there was no will and that the survivors are the four children and the spouse. On September 16, 2016, probate was automatically closed with the outcome being an intestate death with no contradicting document ever being produced and/or admitted into evidence.

Notwithstanding the banter about a community property agreement, no such agreement exists as a matter of record for any case related to the death of Mrs. Mickelson, much less the first filed case in cause #16-4-00861-8, or in any trial or appellate record. As such, the Court cannot consider the

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[1] As of June 13, 2022, a total of 24,546 community property agreements have been recorded with the Pierce County Auditor's Office since the county's inception.

existence of the same from a legal perspective, regarding this probate, as no such document has ever been produced. It was the subject of a subpoena duces tecum which produced no such document.

V. ARGUMENT

A. A trial court erred when it entered findings of fact not supported by evidence in the record.

Since no document has been admitted into evidence at any hearing, the Court is prohibited from recognizing the existence of anything which would contradict its original and subsequent findings that the decedent died intestate and the determination of the final decree of distribution under the default laws of intestate succession under 11.04.015.

The trial court abused its discretion by considering as evidence items which were not, per evidentiary rules. "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion." See *Foxhoven*, 161 Wash.2d at 174, 163 P.3d 786. A trial court abuses its discretion when it makes its decision based on untenable grounds or for untenable reasons." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "A decision based on an erroneous view

of the law is necessarily an abuse of discretion." *Wash. State Physicians Ins. Exch. &Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, there is no evidence in this case, whatsoever. The only law of the case we have is 1.) May 16, 2016 Order of Adjudication of Intestacy and Heirship and 2.) A Petition to Produce a Will has no legal authority to go forward. Any mention of a community property agreement is irrelevant because this purported document is non-existent in the eyes of the court because it has never been admitted into any court of law.

If a party fails to produce a document or make any showing of its unavailability, testimony as to its contents is not an acceptable method of proof. What a lawyer says to the court is not evidence. A recent reminder of this was delivered last week in Judge Penney Azcarate's jury instructions in *John C. Depp, II vs. Amber Laura Heard*, State of Virginia. "In closing arguments, the lawyers will refer to the testimony and the other evidence that you will what you have heard. But ***what the lawyers say*** in their closing arguments ***is not itself evidence.***

Their statements are only their recollection of what the evidence in the case was. It is your collective recollection, as seven jurors, of what ***the evidence in the case was which shall govern your deliberations***." (Emphasis added). This extends to res judicata. There can be no existence of a community property agreement in the eyes of the court because there is no evidence. Under ER 904(a), such document needed to have been offered into the court record. Under ER 904(b), no less than 30 days-notice given to all parties (heirs) of the offered document. Under ER 904(c), within 14 days of notice, an objection to the authenticity of said document can be entered. Without this document ever have been offered into the record as evidence, the objection to its authenticity remains preserved.

B. A trial court erred in its determination of the law of the case.

The law of the case cannot be based on a non-existent document which purports to overwrite the statues related to intestate succession, but rather, is the first and only findings ever signed, *i.e.*, that the decedent died intestate.

While the May 16, 2016 Order of Adjudication of Intestacy and Heirship may not be available as a matter of

public record yet due to a computer glitch, the signature of the clerk stating it was signed and filed in open court, gives it the full force and effect of the original for all purposes, pursuant to RCW 36.23.067. A copy of the original order was filed with the timely in this matter on appeal and presented on the motion for reconsideration before Judge Andrews.

Judge Andrew's departure into a new set of "findings" when she knows the subsequent filings are frivolous and holds no jurisdiction under the first filed rule. Her failure to uphold and an attempt to reverse Commissioner Kirkendoll's May 16, 2016 Order of Adjudication of Intestacy and Heirship was a clearly erroneous decision as she does not have the authority or jurisdiction to overrule the law of the case (CP 10-18, 38-44).

The court that obtained first jurisdiction was by the filing of the petition of adjudication of intestacy and heirship and the order entered on May 16, 2016 in Cause No. 16-4-00861-8. Under the doctrine of "law of the case," as applied in this authority, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are "authoritatively overruled."... Such a holding should

be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside. *Greene v. Rothschild*, 68 Wn.2d 1, 402 P.2d 356, 414 P.2d 1013. If we are to determine which court held first jurisdiction, is that of the very probate which determined the adjudication of intestacy and heirship (CP 43-44).

The only place for a determination of heirship for a decedent to be made is in a probate proceeding, pursuant Washington State Title 11. Under the general probate statutes, the superior court has original jurisdiction in probate matters and broad powers to administer and settle the estates of deceased persons. RCW 11.96.009, .020, .030. Judge Andrews disregards her authority to resolve probate matters, and her suggestion to look elsewhere is prohibited by the deadman's statute, RCW 5.60.030. The judge's citation of *City of Yakima v Int'l Assn Firefighters,* 117 Wn.2d 655, 675, 818 P2d 1076 (1991) is misplaced because this is a labor relations case with a

collective bargaining act in which the union's mediator gained first jurisdiction, dictated by the terms of the union agreement. Further, Judge Andrew's suggestion to use the Uniform Parentage Act or Adoption Act to determine heirship also fails because this would require the decedent to be alive to notarize who are her surviving children, a very backwards and impossible approach since the mother has passed away (Tr. p3, Lines 4-11).

The matters that have been on appeal all related to lost orders and the right to restore them, under RCW 5.48.060, and a respondent's motion to dismiss as void because the order of intestacy is the law of the case. Any mention of a community property agreement with the court of appeals, where they clearly state the issue of the ***validity of the community property agreement is not before them***. Under Washington State Rules of Evidence, the community property agreement is not admissible because it has never been offered and admitted into any court record. Nor has any public record of the said document been authorized to be recorded or filed and actually recorded or filed, nor been proved by copy, certified as correct

evidence rule 904 or testified to be correct by a witness who has compared it with the original. With the first filing being a petition of adjudication of intestacy and heirship and with no evidence of a community property agreement, Judge Andrews must conclude the law of the case as determined on May 16, 2016 under the laws of intestate succession.

VI. CONCLUSION

This Court should recognize the May 16, 2016 Order as the law of the case and reverse the order of dismissal and sanctions and vacate the findings of facts and conclusions of law.

I certify that this document, exclusive of appendices, title sheet, table of contents, and authorities, this certificate of compliance, the certificate of service, signature blocks, and pictorial images, contains 2175 words, in compliance with RAP 18.17. An oral argument is requested under RAP 11.2(a).

Respectfully submitted this 13th day of June, 2022.

Heather Benedict

Heather Benedict, Appellant,
In propria persona

VII. DECLARATION OF SERVICE OF BRIEF OF APPELLANT

I, Heather Benedict, declare that on June 13th, 2022, I deposited into the U.S. Mail, first-class, postage prepaid, the Appellant's Opening Brief addressed to:

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals, Division II
909 A St, Ste 200
Tacoma, WA 98402

A copy was mailed by U.S. mail, postage prepaid, to the Respondent addressed to:

F. Hunter MacDonald
Attorney for James Mickelson, Spouse
Dynan & Associates
2102 N Pearl St, Ste 400
Tacoma, WA 98406-2550

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed at Seattle, Washington this 13th day of June 2022.

Heather Benedict
Heather Benedict, Appellant